United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7524

To be argued by
Harold L. Warner, Jr.

United States Court of Appeals
FOR THE SECOND CIRCUIT

NORTH SHORE TRAVEL SERVICE, INC.,

Plaintiff-Appellant,

-against-

JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, an unincorporated association; PAUL R. IGNATIUS, as President of the Air Transport Association of America; GEORGE A. BUCHANAN, as Executive Secretary of the Air Traffic Conference of America, a division of the Air Transport Association of America; and WILLIAM M. HAWKINS, JR. as Executive Secretary of the Airline Finance and Accounting Conference, a division of the Air Transport Association of America, AIR CANADA, ALLEGHENY AIRLINES, INC., ALOHA AIRLINES, AMERICAN AIRLINES, INC., BRANIFF INTERNATIONAL, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, EASTERN AIR LINES, INC., HAWAIIAN AIR LINES, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, NORTHWEST AIRLINES, OZARK AIP LINES, PIEDMONT AVIATION, SOUTHERN AIRWAYS, TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC.,

Defendants-Appellees.

On Appeal From a Judgment of the United States District Court for the Eastern District of New York

BRIEF OF DEFENDANTS-APPELLEES

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Defendants-Appellees
30 Rockefeller Plaza
New York, N.Y. 10020
(212) 541-5800

Harold L. Warner, Jr.
John N. Romans
Of Counsel

INDEX

Table of Cases

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

NORTH SHORE TRAVEL SERVICE, INC.,

Plaintiff-Appellant,

-against-

JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, an unincorporated association; PAUL R. IGNATIUS, as President of the Air Transport Association of America; GEORGE A. BUCHANAN, as Executive Secretary of the Air Traffic Conference of America, a division of the Air Transport Association of America; and WILLIAM M. HAWKINS, JR. as Executive Secretary of the Airline Finance and Accounting Conference, a division of the Air Transport Association of America, AIR CANADA, ALLEGHENY AIRLINES, INC., ALOHA AIRLINES, AMERICAN AIRLINES, INC., BRANIFF INTERNATIONAL, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, EASTERN AIR LINES, INC., HAWAIIAN AIR LINES, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, NORTHWEST AIRLINES, OZARK AIR LINES, PIEDMONT AVIATION, SOUTHERN AIRWAYS, TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC.

Defendants-Appellees.

- -x

On appeal From a Judgment of the United States District Court for the Eastern District of New York

---

BRIEF FOR DEFENDANTS-APPELLEES

THE ISSUES PRESENTED FOR REVIEW

Did the District Court correctly grant defendants' motion for summary judgment where:

(1) the plaintiff was attempting to relitigate issues decided adversely to plaintiff in a prior state court action; and

(2) defendants' actions were authorized under an agreement between air carriers approved by the Civil Aeronautics Board, thereby relieving defendants from the operations of the antitrust laws pursuant to § 414 of the Federal Aviation Act of 1958 (49 U.S.C. § 1384)?

THE STATUTES INVOLVED

Sections 412 and 414 of the Federal Aviation Act of 1958 (the "Act"), 49 U.S.C. 1382 and 1384; and CPLR Section 7102 are set forth, infra, in Appendix A.

STATEMENT OF THE CASE

By complaint dated February 29, 1975, plaintiff-appellant, North Shore Travel Service, Inc. ("North Shore"), seeks treble damages of $2,250,000 alleging, in its First Claim, that defendants had violated the "antitrust laws

of the United States" in suspending and terminating North Shore's authority to act as agent for the defendant airlines (the "Airlines") under the Sales Agency Agreement between the Air Traffic Conference of America ("ATC") and North Shore (the "Agency Agreement"); and, under its Second Claim, that Section 7102(e) of the New York Civil Practice Law and Rules is unconstitutional, as it permitted ATC to fix "a ridiculous high value" on the property (airline ticket stock) which ATC recovered from North Shore in a prior New York state court replevin action (146a-157a).*

With respect to its Second Claim, North Shore sought to convene "a Statutory Court of three judges" pursuant to 28 U.S.C. § 2284 (157a).

Defendants moved for summary judgment. In a Memorandum of Decision and Order dated December 21, 1976, Chief Judge Jacob Mishler granted defendants' motion, holding that North Shore was estopped from litigating the claims adversely decided against North Shore in the state court replevin action and that defendants' conduct in suspending and terminating North Shore's authority to act as agent for the Airlines under the Agency Agreement had been im-

---

* References in parentheses are to the Appendix filed by appellant. Unless otherwise indicated, emphasis is supplied.

munized from the operations of the antitrust laws pursuant to Section 414 of the Federal Aviation Act (49 U.S.C. § 1384) by reason of the approval by the Civil Aeronautics Board of the Agency Agreement and the ATC Agency Resolution (131a-145a).

FACTS

The Parties

North Shore is a New York corporation engaged in business as a travel agent.

Joseph F. Hintersehr and the other individual defendants-appellees are officers of the Air Transport Association of America ("ATA"), an unincorporated association whose members consist of the scheduled airlines of the United States. ATC is a division of ATA which is responsible for the administration of the relationship between the member airlines and travel agencies. The seventeen named Airlines are all members of ATA with the exception of Air Canada, which is an associate member.

The Agency Agreement

North Shore was party to an "Agency Agreement"

with ATC (11a-12a).* Over 10,000 travel agents throughout the United States are parties to this agreement. See, ATC Agency Resolution Investigation, 29 CAB 258 (1959).

Under the Agency Agreement, North Shore agreed to hold ATC's standard airline tickets in trust for the benefit of ATC's members, the scheduled airlines of the United States (26a). North Shore further agreed to sell these tickets at published tariff rates and to remit the proceeds of such sales, less commissions, to the Airlines' designated area bank three times each month (13a).

The Agency Agreement further provided that if North Shore were guilty of four late remittances during any period of twelve consecutive months, North Shore's authority to act as an approved ATC travel agent would be suspended and North Shore would surrender the airline ticket stock upon demand by ATC (13a).

Commencing in February 1974, it became increasingly evident that North Shore was experiencing financial difficulties. During February and March, the remittances to the Airlines' designated bank were not timely received

---

* The Agency Agreement is a standard form of agreement approved by the Civil Aeronautics Board pursuant to §§ 412 and 414 of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1382, 1384 (Complaint ¶ 19 (151a)).

(14a). Subsequently, North Shore's checks for the reporting periods for April 30, May 30 and July 10, 1974 in amounts of $14,688.67, $16,062.18, and $16,917.40, respectively, were dishonored (16a).

Since North Shore was thus guilty of at least five late remittances in a period of two and one-half months, ATC suspended North Shore's authority to act as an approved travel agent and demanded return of the airline ticket stock (16a).

The Order of Seizure

When North Shore refused to surrender the airline ticket stock as required by the Agency Agreement, ATC instituted a replevin action in the Supreme Court of the State of New York, Nassau County (16a).

Following a full probable cause hearing on August 1, 1974, an order of seizure was issued directing the Sheriff of Nassau County to seize the airline ticket stock and hold it pending the trial of the replevin action (16a, 93a-95a).

The Mail Vote Procedure

Pursuant to the Agency Agreement a suspended travel agent who has surrendered its airline ticket stock

may be reinstated as an approved ATC agent after review by the ATC Agency Committee (13a-14a).

The agent may, however, seek a faster method of reinstatement known as the "Mail Vote." Pursuant to Section VII(C)(4) of ATC's Agency Resolution, incorporated by reference in the Agency Agreement under Paragraph 26 of that Agreement (33a), the agent may send a letter to ATC explaining the reasons for each default, including each dishonored check; the measures he has taken to avoid reoccurrence; and the justification for prompt reinstatement. On receipt of this letter, notice is then mailed to the airline members along with a copy of the agent's letter. Thereafter, the airlines have 15 days to consider the matter. If, pursuant to Section VII(C)(4)(b), no airline asks that the matter be held over for review at the next meeting of the Agency Committee, the agent is automatically reinstated (14a).

North Shore refused to surrender its blank airline tickets to ATC despite demand therefor until the order of seizure was signed and the sheriff took possession of North Shore's blank tickets. Only then did North Shore apply for reinstatement pursuant to the Mail Vote procedure by sending a letter to ATC dated Friday, August 2, 1974. ATC received North Shore's letter on Monday, August

5, 1974, and immediately sent it to the member airlines. ATC received a teletype from American Airlines on August 20, 1974 which stated:

> "Re . . . North Shore Tvl. Svc. Inc. Syosset, N.Y., . . . Request hold off reinstatement under Sec. VII C until further notice" (161a).

Because of the foregoing request that North Shore be held over for review, North Shore was not automatically reinstated by the Mail Vote (42a).

The Termination of North Shore's Agency Agreement

Paragraph 5.A. of the Agency Agreement requires the agent to procure and maintain a surety bond in the minimum amount of $10,000, to protect the member Airlines from an agent's failure to remit the proceeds of ATC domestic airline ticket sales (27a-28a). Paragraph 21 of the Agency Agreement provides:

> "The Agent shall be acceptable to the bonding company for coverage under such bond, and for such amount, as may be required by the Agency Committee of the Air Traffic Conference of America. Failure to so qualify shall immediately terminate this Agreement as between the Agent and all parties to the Air Traffic Conference Agency Resolution" (31a-32a).

On July 30, 1974, North Shore was advised that the bond it had maintained, as required by the Agency Agreement, was being cancelled by the bonding company, effective

August 29, 1974 (44a). North Shore was advised that if it did not either effect reinstatement of the bond or procure a replacement bond by August 29, North Shore's Agency Agreement would be immediately terminated (9a, 20a, 44a).

North Shore failed to effect reinstatment or replacement of the bond. Accordingly North Shore was advised on October 11, 1974 that its appointment as an approved ATC travel agent had been terminated (9a, 21a, 45a).

The State Court Trial

A trial of the action was held before Justice Lynde commencing October 24, 1974.* At the trial North Shore's trial counsel raised the issue of the timeliness of the American Airlines' response to the Mail Vote which was sent out by ATC following the receipt by ATC on August 5 of North Shore's request for a Mail Vote. He contended that the time after August 5 to August 20 was sixteen days and that the American Airlines' response was not within the 15 day period set forth in the Agreement. The trial judge dismissed this method of computation with the observation "I just counted off on my fingers. Go ahead now, next ques-

* The transcript of the trial is available for review, should the Court so desire.

tion."* It is clear from the decision of the trial judge that this contention of North Shore was considered and finally determined against North Shore. As the state court judge noted in his decision:

> "Pursuant to the agreement, North Shore submitted a written explanation of the reasons for each violation in a letter dated August 2, 1974; the letter was circulated by the plaintiffs [ATC] to its members; pursuant to the agreement, one of the members, American Airlines, requested that North Shore's reinstatement be held off under paragraph VII C; as a result of American Airline's request, North Shore's reinstatement, in accordance with the agreement, was held over for review by the Agency Committee at its next meeting" (42a).

The state court trial judge also held:

> "Automatic suspension of North Shore by ATC, pursuant to the terms of the agreement between the parties, was justified and legally proper. . . [ATC is] entitled to possession of the chattels under the terms of their agreement with North Shore in that North Shore has accumulated five late remittances during 1974 . . ." (18a-19a, 43a).

The Affirmance By The Appellate Division

On February 2, 1976, the Appellate Division, Second Department unanimously affirmed stating:

> "In our opinion, appellant's [North Shore's] claims at the trial, and its conten-

---

* N.Y. Supreme Court, Nassau County, trial transcript p. 131.

tions on appeal, were founded on suspicion and not on evidence. Further, the method of valuation of the ticket stock was rational, objective and for appellant's benefit.

"We have examined appellant's other contentions and find them to be without merit" (51 App. Div. 2d 737, 378 N.Y.S.2d 1017-18 (2d Dep't 1976); (19a, 50a).

North Shore's Attempts to Appeal to the New York Court of Appeals

Alleging that Article 71 of the New York Civil Practice Law and Rules is unconstitutional, North Shore then attempted to appeal as of right to the New York Court of Appeals. On May 6, 1976, the New York Court of Appeals dismissed this appeal sua sponte (48a). Hintersehr v. North Shore Travel Service, Inc., 39 N.Y.2d 832 (May 6, 1976).

Thereafter, North Shore moved for leave to appeal to the New York Court of Appeals. North Shore's motion was denied, Hintersehr v. North Shore Travel Service, Inc., 39 N.Y.2d 711 (July 13, 1976).

The Federal Court Action

In the midst of its appeals to the New York State Court of Appeals North Shore commenced the present action against defendants in the Eastern District of New York alleging basically the same facts as had been litigated in the state courts. ATC moved for summary judgment.

The Decision Below

On September 21, 1976 Chief Judge Mishler granted ATC's motion for summary judgment (131a). Judge Mishler recounted the facts noting that "North Shore once again raises allegations of a conspiracy between the ATC and Hempstead Bank to drive it out of business" (140a).

Judge Mishler further held:

> "It is not necessary to once again recount the details cited by plaintiff [North Shore] in support of its assertion. This matter was fully litigated in the state courts. Justice Lynde found the checks were appropriately dishonored and that no agreement existed for the Bank to pay overdrafts. Moreover, the Appellate Division specifically held that North Shore's allegations were founded on suspicion and not evidence" (140a).

As to North Shore's claim that the New York State Replevin Statute is unconstitutional, a claim which North Shore litigated in the state courts, Judge Mishler noted that North Shore's remedy was to apply to the United States Supreme Court from the denial of leave to appeal by the New York Court of Appeals. (142a-143a).*

---

* Although its time to apply for certiorari did not expire until October 13, 1976, North Shore ignored Judge Mishler's suggestion of September 21, 1976 that North Shore might apply for certiorari to review the Court of Appeals' denial for leave to appeal. Instead, North Shore moved in the Supreme Court of Nassau County to set aside the

(footnote cont'd)

ARGUMENT

POINT I

NORTH SHORE IS COLLATERALLY ESTOPPED FROM RELITIGATING ISSUES FINALLY DETERMINED IN THE STATE COURT ACTION

North Shore has previously fully litigated the issues raised in paragraphs 2 through 25 and 33 through 44 of its complaint (48a, 15a-20a). Those issues were necessarily determined in the prior state court action where North Shore had a full and fair opportunity to contest them (48a). North Shore is, therefore, collaterally estopped from litigating those issues again. As stated in Schwartz v. Public Administrator, 24 N.Y.2d 65, 69, 298 N.Y.S.2d 955, 958, 246 N.E.2d 725, 727-28 (1969), "where it can be fairly said that a party has had a full opportunity to litigate a particular issue, he cannot reasonably demand a second one." See also, S.T. Grand, Inc. v. City of N.Y., 32 N.Y.2d 300, 344 N.Y.S.2d 938, 298 N.E.2d 105 (1973).

(footnote cont'd from preceding page)

state court judgment on alleged grounds of lack of jurisdiction. This motion was denied by the Supreme Court, Nassau County, on September 20, 1976. North Shore has filed a notice of appeal to the Appellate Division, Second Department.

The doctrine of collateral estoppel precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955). Nor is the fact that the first judgment was rendered by a state court an impediment to this application of the rule. The state court judgment is entitled to full faith and credit and should be given the same effect by this Court as it would be given in the New York State courts. Durfee v. Duke, 375 U.S. 106 (1963); Ritchie v. Landau, 475 F.2d 151 (2d Cir. 1973); 1 B Moore's Federal Practice ¶0.406[1] at 901.

North Shore's attempt to appeal as of right from the unanimous decision of the Appellate Division, Second Department, affirming the order of the trial court in favor of ATC, has been dismissed by the New York Court of Appeals. Hintersehr v. North Shore Travel Service, Inc., 39 N.Y.2d 832 (May 6, 1976). North Shore's motion for leave to appeal was denied, 39 N.Y.2d 711 (July 13, 1976). Should North Shore have wished to continue its challenge to the constitutionality of the New York replevin statute, its proper course was through application for certiorari to review the New York Court of Appeals' denial of leave to appeal,

not the commencement of another action in the federal courts. In Mitchell v. W.T. Grant, 416 U.S. 600 (1974), an appeal challenging the constitutionality of the Louisiana statute was taken from a decision of the Louisiana Supreme Court.*

The fact that still other appeals might be possible, however, does not suspend the operation of an otherwise final judgment as collateral estoppel. United States v. Nysco Laboratories, Inc., 215 F. Supp. 87 (E.D.N.Y.), aff'd, 318 F.2d 817 (2d Cir. 1963). As Professor Moore explains:

> "Thus a judgment either for plaintiff or defendant, although an appeal is pending, precludes another action between the same parties or their privies on the same cause of action; and in litigation on a different cause of action, is conclusive in favor of the winning litigant of all material issues that were litigated and adjudicated by the trial court's judgment." 1B Moore's Federal Practice ¶0.416[3] at 2253-54.

North Shore is collaterally estopped, therefore, from relitigating the validity of the Agency Agreement, North Shore's five late remittances which resulted in its

---

* North Shore has not stopped litigating the state court case. Its motion to vacate the judgment for lack of jurisdiction based on the contention that North Shore did not really waive the bond was denied on September 20, 1976 and North Shore has filed a notice of appeal to the Appellate Division.

suspension, the valid operation of the Mail Vote procedure, the constitutionality of the New York replevin statute as applied in this case, and the method of calculating the value of the tickets for the purpose of posting a bond.

POINT II

THE ACTIONS OF DEFENDANTS HAVE BEEN IMMUNIZED FROM THE ANTITRUST LAWS

As demonstrated in Point I, North Shore is collaterally estopped from relitigating its suspension and the surrounding events. Subsequent to its suspension, North Shore failed to maintain the bond required by the Agency Agreement (9a, 20a-22a,31a-32a). As demonstrated in this point, defendants' adherence to the procedures expressly authorized by the Civil Aeronautics Board has immunized them from the operations of the antitrust laws.

Section 412 of the Federal Aviation Act (the "Act") states:

> (a) Every air carrier shall file with the Board a true copy, . . . of every contract or agreement . . . affecting air transportation. . ." (49 U.S.C. § 1382).

Section 414 of the Act (49 U.S.C. § 1384) provides that any person affected by any order made under Section

412 of the Act "shall be, and is hereby, relieved from the operations of the 'antitrust laws' . . . insofar as may be necessary to enable such person to do anything authorized, approved or required by such order."*

As stated by the Supreme Court of the United States in Pan American World Airways v. United States, 371 U.S. 296, 304 (1963):

> "Any person affected by an order under §§ 408, 409 and 412 is 'relieved from the operations of the "antitrust laws,"' including the Sherman Act. § 414. The Clayton Act, insofar as it is applicable to air carriers, is enforceable by the Board. 52 Stat. 973, 1028, § 1107(g); 15 U.S.C. § 21."

Likewise, in Hughes Tool Company v. Trans World Airlines, Inc., 409 U.S. 363, 366 (1973), the Supreme Court said:

> "[Transactions] under the control and surveillance of the Civil Aeronautics Board ... by virtue of the Federal Aviation Act of 1958 ... have immunity from the antitrust laws ... This result, we think, is required by §§ 408 and 414 of the Federal Aviation Act and by our prior decision in Pan American World Airways v. United States, 371 U.S. 296 (1963)."

---

* 49 U.S.C. § 1384 states in its entirety:

> "Any person affected by any order made under sections 1378, 1379, or 1382 or this title shall be, and is hereby, relieved from the operations of the 'antitrust laws', as designated in section 12 of Title 15, and of all other

(footnote cont'd)

Pursuant to paragraph 5.A. of the Agency Agreement North Shore was required to procure and maintain a bond, for the benefit of the members of ATC (20a). The bonding requirement was reviewed by the Civil Aeronautics Board and expressly approved by its Order Number E-17968 of January 30, 1962; 35 CAB 866 (1962).

On July 30, 1974, North Shore's bonding company informed it that it elected to cancel the bond effective August 29, 1974. In addition, on August 7, 1974 ATC notified North Shore by certified mail

> "that unless the aforementioned bond is reinstated or replaced, in the proper form and amount, prior to the effective date of its cancellation, we shall have no alternative but to terminate your Sales Agency Agreement. . . .
>
> "[I]t is extremely important that you take immediate steps to arrange to have an acceptable replacement bond in our hands prior to the aforementioned cancellation date.
>
> "Your prompt action is urged!" (20a-21a, 44a).

North Shore neither reinstated nor replaced the bond (9a, 21a).

Paragraph 21 of the Agency Agreement requires that ATC "shall immediately terminate this Agreement as

(footnote cont'd from preceding page)

> restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

between the Agent and all parties to the Air Traffic Conference Agency Resolution" if the Agent fails to maintain a bond (31a-32a).

Therefore, on October 11, 1974, ATC informed North Shore by certified mail that its Agency Agreement was terminated (21a, 45a).

No reply was received from North Shore concerning either the ATC letter of August 7 or the ATC letter of October 11, 1974 (9a, 21a).

Since defendants followed the procedure expressly authorized by the Civil Aeronautics Board, their actions, mandated by the Agency Agreement, are immunized from the antitrust laws. In McManus v. Lake Central Airlines, Inc., 327 F.2d 212 (2d Cir.), cert. denied, 377 U.S. 943 (1964), a travel agency alleged that an ATC member airline conspired with other airlines to exclude it from selling airline tickets. "[T]hese allegations were wholly predicated on Lake Central's membership in the Air Transport Association of America, and the resolution of that organization restricting the dealings of member airlines to travel agencies approved by the association" (Id. at 213). This Court held that approval by the CAB "immunized any conduct 'authorized, approved, or required' by the resolution from the reach of the antitrust laws" (Id.). See also McManus

v. CAB, 286 F.2d 414 (2d Cir.), cert. denied, 366 U.S. 928 (1961).

At pp. 5-10 of its brief to this Court, North Shore quotes extensively from the opinion of Judge Stewart in Lowe v. International Air Transport Association et al., 13 Avi. 18,214 (S.D.N.Y. Jan. 9, 1976) implying that somehow that case is relevant here.*

North Shore's reliance on the Lowe case is totally misplaced. In Lowe, Judge Stewart held that the defendant airlines had lost their antitrust immunity by reason of the "defendants' several violations of the procedural requirements established by the CAB as express conditions upon its approval of Resolution 810a" of the International Air Transport Association ("IATA") (13 Avi. at 18,220). The violations referred to were the failure of IATA "to distribute Hefler's materials to the AAB [IATA's Agency Administration Board], and on the part of the AAB, to consider the documents in reaching its decision to terminate Hefler's approval as required by the CAB" (Id. at 18,217); the failure of IATA "to comply with the requirement that

---

* As indicated by plaintiff's counsel in his affidavit of May 25, 1976, counsel for defendants-appellees herein were also counsel for defendants in the Lowe case (90a). No appealable order has been issued in the Lowe case, which is awaiting trial on the issue of damages.

the specific factual grounds for the cancellation be recorded" (Id. at 18,218); and the failure of IATA to give the agent sufficient "written notice which specifies the reasons for his termination by the AAB" (Id.).

In the present case, no contention can be made that North Shore did not have total and complete notice of the reasons why it had been suspended by ATC when three of North Shore's checks, totaling in excess of $40,000, were dishonored (8a). Furthermore, North Shore had twice been notified that its agency agreement would be terminated if it failed to maintain the required bond (9a, 20a, 44a). And on October 11, 1974, North Shore was notified by certified mail that its agency agreement was terminated for failure to maintain the required bond (45a).

In Grueninger International Travel, Inc. v. Air Transport Association of America, et al., 405 F. Supp. 1241 (D.D.C. 1976), appeal docketed, No. 76-1236 (D.C. Cir. Mar. 15, 1976), plaintiff argued that the defendants Air Transport Association of America and its member airlines had forfeited exemption from the antitrust laws since plaintiff "was not given proper 45 days' notice that its case would be presented to the ATC Committee at its semi-annual meeting, that at the meeting its application was treated summarily and that the minutes of the pertinent Committee

meeting are either missing or destroyed" (405 F. Supp. at 1243). In rejecting this argument as "without merit" and holding that "minor procedural irregularities" do not void antitrust immunity, the court cited with approval the prior decision of Judge McLean in Hefler v. International Air Transport Association, 11 Avi. 17,540; 1970 Trade Cas. 73,190 where Judge McLean concluded that:

> "[i]t seems to me that plaintiff is seeking to take advantage of a blunder of IATA's part . . . in order to obtain judgment by default, so to speak, without regard to the fact that IATA's error in the form of notice did plaintiff no real harm . . . [t]o grant summary judgment here would emphasize form over substance and would enforce only the letter of the CAB's order without regard to its fundamental purpose." (11 Avi. at 17,541).

In the present case, North Shore can point to no blunder on the part of ATC. ATC scrupulously followed the provisions of the ATC Agency Resolution and Agency Agreement approved by the Civil Aeronautics Board.

POINT III

THE ALLEGED UNCONSTITUTIONALITY OF NEW YORK'S REPLEVIN STATUTE WAS FULLY LITIGATED IN THE STATE COURT ACTION AND NORTH SHORE'S CHALLENGE THERETO IS PATENTLY FRIVOLOUS

In its Second Claim, North Shore asserts that ATC "fixed a ridiculous high value" on the airline ticket

stock ATC sought to repossess in the State Court action (156a). North Shore asserts that CPLR § 7102(e), prescribing that the undertaking to be furnished by the plaintiff in a New York replevin action shall be "not less than twice the value of the chattel stated in the plaintiff's affidavit," is unconstitutional and violative of the Equal Protection Clause of the Fourteenth Amendment (157a).

Accordingly, North Shore requests the convening of a Statutory Court of three judges in accordance with Title 28, United States Code Section 2284.

The issues raised by North Shore's Second Claim were fully litigated in the state court action. Furthermore, the charge that CPLR § 7102(e) is unconstitutional is patently frivolous.

When North Shore appealed to the Appellate Division, Second Department in the state court action, North Shore argued that CPLR § 7102(e) was unconstitutional because it permitted ATC to place "a fictitious value of $452,000" on the airline ticket stock held by North Shore, thereby preventing "North Shore from getting the benefits of CPLR § 7102(e) as it was well aware to plaintiff that no bonding company would give North Shore a bond in the sum of $900,000" (56a).

The Appellate Division rejected this contention,

stating:

> "Further, the method of valuation of the ticket stock was rational, objective and for appellant's benefit" (51 App. Div. 2d 737, 378 N.Y.S.2d 1017 (2d Dep't 1976); (50a)).

The frivolous nature of North Shore's constitutional attack on New York's replevin statute is further demonstrated by the fact that the New York Court of Appeals dismissed, sua sponte, North Shore's attempt to appeal as of right from the decision of the Appellate Division. Hintersehr v. North Shore Travel Service, Inc., 39 N.Y.2d 832 (May 6, 1976). And subsequently the New York Court of Appeals denied North Shore's motion for leave to appeal. Hintersehr v. North Shore Travel Service, Inc., 39 N.Y.2d 711 (July 13, 1976).

The issues of North Shore's Second Claim in this case were fully litigated in the state courts. Furthermore, the charge that Article 71 of the New York Civil Practice Law and Rules is unconstitutional, is absurd and patently frivolous.

(a) Article 71 of the New York Civil Practice Law and Rules is Constitutional

In Fuentes v. Shevin, 407 U.S. 67 (1972), the Supreme Court of the United States held that the replevin provisions of Florida and Pennsylvania law violate the

Fourteenth Amendment guarantee that no state shall deprive any person of property without due process of law "insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor" (407 U.S. at 96).

In so ruling, the Court stated:

> "Our holding, however, is a narrow one. We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing" (Id. at 96).

Fuentes was followed by Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). In Mitchell, the Supreme Court upheld the constitutionality of the Louisiana sequestration law under which, "without prior notice to Mitchell [the installment sale vendee] or affording him opportunity for hearing" (416 U.S. at 602), goods might be sequestered by the Constable upon a writ of sequestration signed by the court based upon an ex parte petition and affidavit by the vendor. In so ruling, the Supreme Court pointed out that the vice of the Florida replevin law held unconstitutional in Fuentes, supra, was that it authorized "repossession of the sold goods without judicial order, approval, or participation" (416 U.S. at 615).

The Fuentes and Mitchell cases were subsequent-

ly reviewed by the Supreme Court in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). There the Supreme Court held that the Georgia garnishment law violated the Due Process Clause of the Fourteenth Amendment because property "was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer" (419 U.S. at 606).

Manifestly, the provisions of the New York law here challenged fully meet the Due Process standards applied by the Supreme Court in Fuentes, Mitchell and North Georgia Finishing. Before an order of seizure may issue under Article 71 CPLR, the New York court must satisfy itself that the terms of the order of seizure are such as "to conform to the due process of law requirements of the fourteenth amendment to the constitution of the United States" (CPLR § 7102(d)).

When the replevin action against North Shore was commenced, the Supreme Court, Nassau County, took great pains to insure that the rights of North Shore under the Fourteenth Amendment were so satisfied. Before the order of seizure was issued, there was a full probable

cause hearing on notice to North Shore and in which North Shore participated; and at this hearing, North Shore was permitted to cross-examine ATC's witnesses and otherwise fully participate in the proceedings to determine the probable validity of ATC's claim (8a, 16a, 43a).

In Long Island Trust Company v. Porta Aluminum Corp., 44 App. Div.2d 118, 354 N.Y.S.2d 134 (2d Dep't 1974), the court upheld the constitutionality of Article 71 CPLR, as applied by Special Term in that case, where "the defendants were permitted to submit lengthy affidavits ... and were heard in oral argument . . . " (44 App. Div.2d at 124, 354 N.Y.S.2d at 140). The court noted that it had no "doubt that out of a super-abundance of caution the Special Term would have ordered such a hearing to make certain that its procedures conformed 'to the due process of law requirements of the fourteenth amendment to the constitution of the United States; as specified in paragraph 1 of subdivision (d) of CPLR 7102, if a request therefor had been made" (Id.).

The Supreme Court, Nassau County, exercised precisely such "super-abundance of caution" before the order of seizure was issued in the North Shore replevin action. North Shore was given full notice and opportunity to participate in a hearing "aimed at establishing the validity, or

at least the probable validity, of the underlying claim" of ATC against North Shore (Fuentes v. Shevin, supra, at 97).

(b) No Improper Valuation was Placed on the Property

North Shore claims, as it did in the state court action, that too high a value was placed on the airline ticket stock repossessed, thereby unconstitutionally preventing North Shore from retaining the ticket stock pendente lite by posting its own bond pursuant to CPLR § 7103(a) (156a).

There simply is no basis for any such argument. In the first place, ATC carefully calculated the dollar price of the average airline ticket sold by North Shore, based on North Shore's actual sales over a period of three months. This resulted in an average price of $175.48 per ticket. 2,602 tickets were wrongfully withheld by North Shore. Accordingly, the aggregate value of the chattels claimed was fixed at $456,598.96. Manifestly, there can be no more accurate way of calculating the value of the tickets held by North Shore on August 1, 1974 than to base such valuation on the average of North Shore's actual sales. Indeed, this is the only practical way to fix such

value.*

In the second place, North Shore utterly fails to comprehend that the bond otherwise required to be posted by ATC pursuant to CPLR § 7102(e) is for North Shore's own protection. The reason CPLR § 7102(e) requires a bond in an amount "not less than twice the value of the chattel stated in the plaintiff's affidavit" is to make doubly sure that a defendant, such as North Shore, is provided ample security on which to base a possible future recovery of damages, should the court ultimately determine that the order of seizure was issued wrongfully. It makes no sense whatsoever to argue that ATC was giving North Shore too much protection.

Finally, what makes North Shore's argument totally irrelevant here is that no value was fixed by the Supreme Court, Nassau County. ATC had offered to post a bond in the amount of $913,197.92, twice the value of the 2,602 tickets wrongfully withheld by North Shore on August 1, 1974. Recognizing, however, that it would be

---

* "In these days of airplane hijacking and counterfeiting, the forms of airline tickets may have great value." Hintersehr v. Udell Travel Service, Inc. (Supreme Court, New York County, Index No. 17485/1970, Kupferman J., November 4, 1970).

held liable to ATC for the approximately $7,000 cost of the premium for such a bond should the trial court hold -- as it ultimately did, following the trial of the replevin action -- that ATC was entitled to recover the airline ticket stock, North Shore waived the furnishing of any bond (8a, 92a, 122a). Pursuant to stipulation of the parties, the order of seizure accordingly merely provided that the Sheriff should take the chattels into his possession "and hold [them] pending the trial of this action" (95a). Thus, the ticket stock was not returned to ATC after the normally prescribed ten-day period (CPLR § 7102 (f)). There is, thus, no basis whatsoever for the ridiculous charge that the New York State courts unconstitutionally placed too high a value on the airline tickets in the North Shore replevin action.

As held by the Appellate Division, Second Department ". . . [ATC's] method of valuation of the ticket stock was rational, objective and for [North Shore's] benefit" (50a).

POINT IV

THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT

As heretofore demonstrated, and as found by Judge

Mishler below (131a-138a, 140a), the issues dealing with ATC's right to recover the airline ticket stock, the propriety of ATC's actions in administering the Agency Agreement and the Mail Vote procedure thereunder, the claims that ATC wilfully and maliciously conspired with North Shore's bank to prevent North Shore from operating its business, and the constitutionality of New York's replevin statute as applied in the state court action, were all previously litigated and determined adversely to North Shore in the state court action.

Pursuant to Rule 9(g) of the General Rules of the United States District Court for the Eastern District of New York, ATC annexed to its motion for summary judgment the material facts as to which ATC contended there is no genuine issue to be tried (7a-9a). Despite the requirement of Rule 9(g) that it submit a "separate, short and concise statement of the material facts" which it disputed, North Shore filed no such statement. ATC's 9(g) statement is thus uncontested.

Instead of filing the required "separate, short and concise statement" of the material facts which it disputed, North Shore filed a counter motion for partial summary judgment for $9,082.90, representing refunds allegedly made by North Shore to its customers (71a-74a). North

Shore erroneously contended that ATC's moving papers before Judge Mishler "very carefully avoid any reference to these monies so, therefore, admit the same are due plaintiff" (74a).

ATC replied to this charge, showing that its moving papers before Judge Mishler not only controverted "the allegations that any monies are due plaintiff, but show instead plaintiff owes defendants $16,991.61" (114a). See Saunders' affidavit of May 5, 1976, paragraph 19 (20a-22a) Even if North Shore's allegation were accepted as true, as pointed out by Judge Mishler it "does not raise a material issue of fact" in this case but "at most gives rise to a contract claim" for $9,082.90 which is not sufficient to invoke the jurisdiction of this Court (141a-142a).*

Since ATC's 9(g) statement was uncontested, there was no need for Judge Mishler to go further. Nonetheless, it is apparent from his careful opinion below that Judge Mishler gleaned the affidavits of North Shore's counsel and secretary-treasurer, Frank Monello, and the confused hotchpotch of legal arguments, excerpts from the state

---

*The dispute as to whether North Shore owes the Airlines $16,991.61 or is owed $9,082.90 is presently being litigated in the state courts. In Insurance Company of North America, on its own behalf and as subrogee of Air Traffic Conference of America v. North Shore Travel Service, Inc. et al., Supreme Court, New York County, No. 05851/76, N.Y. Law Journal, Jan. 11, 1977, p. 10, col 4, Justice Helman granted summary judgment finally determining this issue and awarding ATC's surety the money which it had paid to ATC after North Shore's default. North Shore is collaterally estopped, therefore, from relitigating that issue in this Court.

court trial and North Shore's brief to the Appellate Division, Second Department, annexed thereto (73a-112a, 125a-127a).

The only allegedly "new" matter which Judge Mishler could glean from this confusion was the suggestion in Mr. Monello's affidavit of June 1, 1976 that "ATC improperly applied pressure on the Insurance Company of North America to cancel the surety bond" (141a).*

Judge Mishler correctly ruled that

> "plaintiff offers nothing in support of this bare allegation. A bald assertion is insufficient to raise a material fact barring summary judgment. Rule 56(e) F.R.C.P. Nor can such an unsupported claim be the basis of an alleged antitrust violation" (141a).

There is no allegation by North Shore in the record before this Court that North Shore made any request whatever of the Insurance Company of North America to reinstate its bond. Even were this Court to give any credence whatever to the bald assertion that the Insurance Company of North America is "under its [ATC's] control" (80a), there are over 250 surety companies in the United States, other than the Insurance Company of North America,

---

* Mr. Monello's affidavit stated "The ATC seemed to realize the waviness of its position, and so obtained from the insurance company, which is under its control, an alleged cancellation of North Shore Travel's Bond, and then permanently suspended North Shore Travel" (80a).

to whom North Shore could have applied for the required bond.* There is no allegation that North Shore made any such application.

CONCLUSION

The complaint in this case is a frivolous attempt to recloak in "antitrust" garb, matters adversely determined to North Shore in a prior state court action.

North Shore is estopped from attempting to relitigate the issues raised in the replevin action determined by the New York State courts. The actions of the defendants herein were authorized under agreements filed with and approved by the Civil Aeronautics Board. Accordingly, defendants are relieved from the operations of the antitrust laws and the judgment of Chief Judge Mishler granting ATC summary judgment dismissing the complaint should be affirmed with

---

* The Department of the Treasury, Fiscal Service, Bureau of Government Financial Operations (Department Circular 570: 1976 Rev.) "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies" lists 264 bonding companies.

double costs awarded appellees.

Respectfully submitted,

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Defendants-Appellees
30 Rockefeller Plaza
New York, New York 10020
(212) 541-5800

Harold L. Warner, Jr.
John N. Romans

Of Counsel

January 13, 1977

APPENDIX A

THE STATUTES INVOLVED

I. FEDERAL AVIATION ACT OF 1958

§ 412 [Pub. L. 85-726, title IV, § 412, Aug. 23, 1958, 72 Stat. 770, 49 U.S.C. § 1382]

Pooling and Other Agreements

FILING OF AGREEMENTS REQUIRED

SEC. 412. (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

APPROVAL BY BOARD

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended,

governing the compensation to be received by such common carrier for transportation services performed by it.

§ 414 [Pub. L. 85-726, title IV, § 414, Aug. 23, 1958, 72 Stat. 770, 49 U.S.C. § 1384]

LEGAL RESTRAINTS

SEC. 414. Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

* * *

II. NEW YORK CIVIL PRACTICE LAW AND RULES

§ 7102. Seizure of chattel on behalf of plaintiff.

(a) Seizure of chattel. When the plaintiff delivers to a sheriff an affidavit, order of seizure and undertaking and, if an action to recover a chattel has not been commenced, a summons and complaint, he shall seize the chattel in accordance with the provisions of the order and without delay.

(b) Service. The sheriff shall serve upon the person from whose possession the chattel is seized a copy of the affidavit, order of seizure and undertaking delivered to him by the plaintiff. Unless the order of seizure provides otherwise, the papers delivered to him by the plaintiff, shall be personally served by the sheriff on each defendant not in default in the same manner as a summons or as provided in section 314; if a defendant has appeared he shall be served in the manner provided for service of papers generally.

(c) Affidavit. The affidavit shall clearly identify the chattel to be seized and shall state:

1. that the plaintiff is entitled to possession

by virtue of facts set forth;

2. that the chattel is wrongfully held by the defendant named;

3. whether an action to recover the chattel has been commenced, the defendants served, whether they are in default, and, if they have appeared, where papers may be served upon them;

4. the value of each chattel or class of chattels claimed, or the aggregate value of all chattels claimed; and

5. if the plaintiff seeks the inclusion in the order of seizure of a provision authorizing the sheriff to break open, enter and search for the chattel in the place where the chattel may be, facts sufficient under the due process of law requirements of the fourteenth amendment to the constitution of the United States to authorize the inclusion in the order of such a provision.

(d) Order of seizure. 1. Upon presentation of the affidavit and undertaking and upon such terms as may be required to conform to the due process of law requirements of the fourteenth amendment to the constitution of the United States, the court shall grant an order directing the sheriff of any county where the chattel is found to seize the chattel described in the affidavit and including, if the court so directs, a provision that, if the chattel is not delivered to the sheriff, he may break open, enter and search for the chattel in the place where the chattel may be.

2. If the order of seizure does not include the provision permitted by paragraph one of this subdivision, the court shall grant a restraining order that the chattel shall not be removed from the state if it is a vehicle, aircraft or vessel or, otherwise, from its location, transferred, sold, pledged, assigned or otherwise disposed of or permitted to become subject to a security interest or lien until further order of the court. Unless the court otherwise directs, the restraining order does not prohibit a disposition of the chattel to the plaintiff. Disobedience of the order may be punished as contempt of court.

(e) Undertaking. The undertaking shall be executed by sufficient surety, acceptable to the court. The

condition of the undertaking shall be that the surety is bound in a specified amount, not less than twice the value of the chattel stated in the plaintiff's affidavit, for the return of the chattel to any person to whom possession is awarded by the judgment, and for payment of any sum awarded by the judgment against the person giving the undertaking. A person claiming only a lien on or security interest in the chattel may except to the plaintiff's surety.

(f) Disposition of chattel by sheriff. Unless the court orders otherwise, the sheriff shall retain custody of a chattel for a period of ten days after seizure. At the expiration of such period, the sheriff shall deliver the chattel to the plaintiff if there has not been served upon him either a notice of exception to plaintiff's surety, a notice of motion for an impounding or returning order, or the necessary papers to reclaim the chattel. Upon failure of the surety on plaintiff's undertaking to justify, the sheriff shall deliver possession of the chattel to the person from whom it was seized.

Two Copies Received [illegible]

Bernard Meyerson

by Leonard Bernstein